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## The Jurisdiction of Courts of Equity to Administer Insolvents' Estates, Considered in Relation to Historical Antecedents

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THE JURISDICTION OF COURTS OF EQUITY TO  
ADMINISTER INSOLVENTS' ESTATES, CON-  
SIDERED IN RELATION TO HISTORICAL  
ANTECEDENTS.\*

IV.

Thus far our discussion has carried us into the history of two types of creditors' bills, the first to reach assets in the hands of a debtor's executor, and the second to reach a debtor's equitable assets during his lifetime. A third type of creditors' bills, designed to reach property fraudulently conveyed by a living debtor to a third person, has been mentioned but not discussed. This has been because the latter class does not seem to have consequences to the administrative jurisdiction of equity, and does not therefore seem germane to the principal purpose of this paper to uncover the historical antecedents of that jurisdiction.

The essential elements of the subject of fraudulent conveyances may be obtained from Mr. Glenn's book on Creditors' Rights.<sup>85</sup> It may be advisable, however, to make two observations which will serve to throw creditors' bills to set aside fraudulent conveyances, into correlation with other equitable creditors' remedies. The first observation to be made is that the right of a creditor to have satisfaction from property fraudulently conveyed by a debtor, is not a right which equity in the development of its creditors' bills created. This was the work of the Statute of 13 Elizabeth, Chapter 5, commonly known as the Statute of Fraudulent Conveyances, which declares all conveyances of certain types of property made with the intent to hinder, delay or defraud creditors,

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85. Glenn, Creditors' Rights, pp. 49-137.

void; with a proviso saving the rights of bona fide purchasers for a valuable consideration. The true function of the creditors' bill to set aside fraudulent conveyances, was to render more complete the common law remedies under the statute. The statute, declaring the conveyance void, would justify a common law execution as if the property instead of being conveyed were still the debtor's. This, however, was an inadequate remedy inasmuch as the amount which the creditor could derive from the sale of the property under execution depended upon how clear a title the sheriff's deed would convey. The common law process involved no adjudication of this matter. Equity was able, however, to furnish an adequate remedy by allowing a bill to set aside the conveyance to be filed, and the right of realization from the land alleged to have been fraudulently conveyed to be determined.

The second observation to be made is on the question of the fraudulent conveyance of equitable assets, the fraudulent conveyance of which was not governed by the Statute of 13 Elizabeth. The relief asked in a creditor's bill to set aside a conveyance of equitable assets, would have required two processes, the nullification of the conveyance to the third person, and the equitable execution against the property as equitable property of the debtor's. The latter right had been definitely established. It was the former, the nullification of the conveyance of the equitable property, which caused the difficulty, since equitable property was not mentioned by the Statute of Elizabeth. The English Court of Chancery in *Dundas v. Dutens*,<sup>86</sup> the same case in which Lord Thurlow repudiated the doctrine of equitable execution against equitable interests in choses in action, declined to allow a bill to set aside a fraudulent conveyance of equitable property. Lord Thurlow evidently saw no justification in granting the relief which the statute directs, except in connection with conveyances of the kinds of property specified. There was

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86. 1 Ves. Jr. 196.

a strong tendency in the United States<sup>87</sup> to follow the earlier English cases of *Taylor v. Jones*,<sup>88</sup> assuming the jurisdiction.

Perhaps the dominant motif of the early course of equitable growth in the matter of creditors' remedies, was the inadequacy of legal execution in the various instances in which equity acted, and the various junctures where its remedies appeared. Its chief concern was not the supplanting of the common law system of judgment and execution, a system far more simple than, and equally effective in most cases with, the Roman Law method of execution; but it was the patching up of the common law system. The various remedies, appearing in the course of this patching up process, creditors' bills, will be seen to involve this defect, that if the debtor turn out to be insolvent, a race of creditors will ensue, and priorities will fall to the more diligent. To the appearance of other remedies designed to secure equal distribution through administration, the course of this discussion will be forthwith directed.

It has appeared that in the instance of the creditors' bill against a decedent's estate, equity extended its remedies to legatees who were encumbered with similar difficulties at law to those of the creditor. As no legatee would be entitled to a distribution until all the debts of the estate had been paid; and since the legatees were all entitled to be paid ratably, the remedy which ensued upon the bringing of a legatee's administration bill was not only the account, and payment of the plaintiff if the account so justified, but also a complete execution of the account. The items of the account were not merely records of prior claims, but records of prior payments. Not so in the case of a creditor's bill. As the creditor's right was not subject to prior claim, and since equity was as indicated

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87. Glenn, Creditors' Rights, citing:  
Hadden v. Spader, 20 Johns. 554;  
Edmonson v. Meacham, 50 Miss. 34;  
Gowing v. Rich, 1 Ired. 553.

88. 2 Atk. 600.

above not replacing, but supplementing the common law system of priorities, a bill by a creditor to recover his own debt never involved the payment of any other debts.<sup>89</sup> Even where there were debts of higher nature than the plaintiff's, their existence was taken into consideration in adjudging whether the plaintiff was entitled to payment, but they were not paid prior to his,<sup>90</sup> as Professor Langdell puts it, equity in that respect following the analogy of the law. With the further growth of administration bills brought by legatees, we are not at present interested. The growth of the administration bills in favor of creditors is the thing which is likely to be very fruitful to our inquiry. It will hardly be necessary, though, to pay a great deal of attention to the special cases of judgment and specialty creditors.

It will be recalled from the discussion in earlier portions of this paper that simple creditors' bills against executors were of exceedingly early origin; and that the legatee's administration bill was first recognized in 1640. The creditor's administration bill was simply the lineal descendant of that type of simple creditor's bill, which was brought by one or all for the benefit of all. That this type of bill should meet favor in equity is beyond all doubt, because it enabled equity to make an equal distribution of the debtor's property. By suing for the benefit of all the creditors, the plaintiff submitted to the equal treatment of the subsequently appearing creditors; or by joining in the action by a number of creditors, the plaintiff submitted to equal justice with them. Such equal justice is the very thing that equity had been dispensing in the case of trusts created by a testator for the payment of his debts where the fund was insufficient. As an illustration of this, see *Povye's Case* (1680).<sup>91</sup> How zealously equity seized upon opportunity to apply the doctrine of equality of distribution, and how vigorously it applied it, may be seen in the

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89. Langdell, *Brief Survey of Equity Jurisdiction*, p. 168.

90. Anonymous 3 Atk. 572.

91. 2 Freeman 51.

doctrine of equitable assets, which it first applied to testamentary trusts as in the case of *Feverstone v. Scetle* (1697);<sup>92</sup> and then to administrations upon suit of creditors, as to which the leading case is that of the *Creditors of Sir Charles Cox* (1734).<sup>93</sup> Under this doctrine the legal assets of the testator were applied to the payment of debts according to the Common Law priorities, that is, accordingly as the debts were judgment debts, specialty debts, or simple contract debts; whereas, the equitable assets were applied to all debts pro rata in such a fashion that if the prior creditors had received priorities in the legal assets, their realization from the equitable assets was postponed until the simple contract creditors have received an equal proportion of their respective debts. This meant that in equity all creditors with claims existing at the time of the debtor's death were to be regarded as equal, unless after his death they acquired a judgment prior to the administration suit being brought, in which instance the priority gained by the judgment lien would have to be respected. As to the ascendancy of the administration bill as a preventative of such prior liens, there will be occasion directly to speak.

Genetically, then, there is nothing new in the subject of our present discussion, so far as the invocation of equity's jurisdiction to act in the premises is concerned; but generically, the administration bill, involving as it does the principle of equal distribution of assets, is something quite different from its progenitor. When we have examined, first, the protection which equity threw about such a bill, once it had taken jurisdiction over it, and secondly the inducements, which equity created for the bringing of the creditor's administration bill, rather than the creditor's individual bill, we shall see the former assuming such a supremacy as makes admin-

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92. 3 Salkeld 83;

See also, *Sheppard v. Kent*, 2 Vern. 435.

93. *Creditors of Sir Charles Cox*, 3 P. W. 341;  
In re Poole, 6 Ch. Div. 739.

tration upon a basis of equality one of the fundamental doctrines of equity.

First, as to the protection which equity threw about creditors' administration bills. Plainly, the end which the administration bill had in view was to require all creditors to present their claims to the Master in Chancery in the court in which the bill was then pending, and, after the liquidation of assets by the executor, to have such assets applied pro rata (with the exceptions growing out of the different applications of legal and equitable assets) to the satisfaction of the debts. To the accomplishment of this purpose the great barrier was the jurisdiction at law to give judgment upon claims as presented by individual creditors in individual actions. Professor Langdell described the difficulty as follows:<sup>94</sup>

"But it was still possible for one creditor to gain priority over others by obtaining a judgment at law against the executor; and unless some means could be found of preventing that, no creditor would find it worth his while to file a bill in equity on behalf of himself and the other creditors for the administration of the estate, and every insolvent estate of a deceased debtor would be exhausted in a ruinous struggle among the creditors for priority, or at best every executor whose testator's estate was insolvent would be forced to give a preference to those creditors whom he most favored by either paying them in full or by confessing judgments in their favor."

That the problem is most poignant in the instances of insolvency goes without saying. The solution was attained by a series of decisions consisting of *Douglas v. Clay* (1767)<sup>95</sup> *Brooks v. Reynolds* (1782)<sup>96</sup> and *Kenyon v. Worth-*

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94. Langdell, *Brief Survey of Equity Jurisdiction*, pp. 172-73.

In the sentences immediately following, the conceptions are largely drawn from Professor Langdell's *Essays*.

95. *Dickens* 393.

These injunctions against obtaining priorities by actions at law seem to have been employed earlier in the case of testamentary trusts. See, *Sheppard v. Kent* (1702), 2 Vern. 435.

96. 1 *Brown's C. C.* 183.

ington (1786),<sup>97</sup> in which injunctions were granted against creditors prosecuting their claims in actions at law. The ground for such a decree was that as to all of the assets of the estate, the executor had by the decree for administration, been made accountable to the court of equity; and equity would not permit another court to affect that accountability. Said the Court in *Kenyon v. Worthington*:

"Having decreed an account of what is due to all creditors, and having decreed an account of assets, and the administration of them in payment, will the Court suffer its decree to be rendered nugatory by altering the course of administration? Certainly not. It will surely protect the executor or administrator in obeying its decrees; the creditors will have justice here."

By a subsequent development, the practice grew up of granting an injunction upon a motion filed in the administration suit by the executor or by the plaintiff.<sup>98</sup> The former type of motion, that of the executor, was regarded by Professor Langdell as a procedural anomaly, the granting of relief without suit; the latter type of motion, at the instance of the plaintiff creditor, was regarded as a violation of the rights of the party suing at law, since relief was granted against him without a suit to a party who could not have obtained it by a suit. Probably the Court in reaching this result, had in its mind the consummation to be wrought from an administration bill, the bringing of all the creditors before the court; and, with the consummation in its mind, assumed a jurisdiction to hear the motions of the creditors inter se. It follows, a fortiori, from the fact that equity enjoined actions at law by individual creditors which were pending at the time of a decree for administration, that it dissolved suits in equity by individual creditors. However, under the doctrine of *Marriage v. Skiggs* (1859),<sup>99</sup> and

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97. Dickens, 668.

98. Langdell, Brief Survey of Equity Jurisdiction, p. 177 and cases cited.

99. 4 De G. & J. 4.



*Fowler v. Roberts* (1860),<sup>100</sup> a creditor who had obtained judgment at law against the executor before a decree for administration had been issued, might proceed by way of execution or garnishment, thus preserving priorities already attached.

Secondly, we come to the matter of the inducements which equity created for the bringing of a creditor's administration bill rather than a creditor's equitable execution bill. It will readily appear that if an estate is insolvent there is a strong inducement for each creditor to get what he can, and since an early judgment at law will give him a priority in the satisfaction of his claim over the other creditors, which will under *Marriage v. Skiggs* be unaffected by a subsequent decree for administration, he will naturally proceed at law or in equity by way of equitable execution. People never walk to the exits in a fire, with the result that some are crushed. No less can we expect creditors to walk arm in arm to court, and declare that they wish to share equally in the assets; they rush with the result again that some are left by the wayside. If then this system of administration bills were to effect practical equality, it was necessary to devise a system whereby administration bills could be made to antecede the individual's bills. This was effected by way of the direct encouragement by equity of collusive administration bills, whereby an executor co-operated with a creditor in his becoming plaintiff in an administration suit, or the executor sued himself in the name of a creditor. In the case of *Gilpin v. Lady Southampton* (1812),<sup>101</sup> Lord Eldon said:

"Ever since I have known this Court suits have been allowed against executors, in truth by executors, in the name of a creditor against themselves; and this was allowed upon a

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100. 2 Giffard 226.

101. *Paxton v. Douglas*, 8 Ves. Jun. 520;  
18 Ves. Jun. 469.

principle of this sort; that as executors have vast powers of preference at law; the Court has not disapproved of their coming in the shape of an application by a creditor to give a judgment to all the creditors, and to secure a distribution of the assets without preference to any."

It would not have been seemly for Lord Eldon to have said the principle was of the sort to prevent law courts from getting jurisdiction, but it has not escaped him to mention that equality was the meritorious result achieved. Collusive suits were, however, carefully examined for fraud, and disallowed if it appeared that the chief purpose in bringing them was to hinder and delay creditors. The case of *Powell v. Wallworth* (1817)<sup>102</sup> is interesting. Here an injunction against a creditor's action at law was dissolved because it appeared that the administration suit on account of which it was issued appeared to be a mere pretext to hinder, delay, and defraud creditors.

The common law and equity had started out with systems of creditors' remedies based upon individual creditors' actions or suits for individual judgments or decrees, followed by individual executions. Yet equity had by the beginning of the Nineteenth Century reached—in the case of deceased debtors at least—a system of administrative remedies, and—shall we say?—universal execution. In the result this was very much like the Roman *venditio bonorum*. In the process of the making, it was entirely different. The remedial organ of the English law was a superstratum. While its substance permeated deeply the strata below, the character of those under-strata—the individuality and identity of them—was not easily to be wiped out. Hence it was that equity accomplished by indirection what the Roman Law came to directly. Equity was only strong where the Common Law was weak. Its guiding principle was the inadequacy of remedy at law.

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102. *Paxton v. Roberts*, 8 Vesey Jun. 520;  
*Powell v. Wallworth*, 2 Madd. 183.

Hence it is that piecemeal it reached the result of universal execution which the Roman Law seems to have grasped in its entirety.

## V.

What then is the American receivership doctrine? As a form of creditors' remedy, it reached the maturity of its development in the case of *Re Metropolitan Receivership*,<sup>103</sup> which was decided in the Supreme Court of the United States in 1908. At that point of its development we see the doctrine freed of earlier dogmas, of which we have had occasion to speak; and at that point it is most amenable to the analysis of its elements.

The Metropolitan Railway Receivership Case involved a great mass of litigation arising out of the insolvency of the New York City Railway Company. A bill was filed in the United States Circuit Court for the Southern District of New York by the Pennsylvania Steel Car Company, and the Degnon Contracting Company, Simple creditors of the New York City Railway Company, for a receiver to be appointed over the latter Company. The bill alleged diversity of citizenship as a ground for Federal jurisdiction, and insolvency as a ground for a receivership. It set up the inadequacy of the remedy at law to creditors in general by reason of the inability of the Company to continue to pay the interest charges on its funded debt—a thing which might lead to foreclosures and dismemberments of the property,—and the inability of the Company to meet its floating indebtedness,—a thing which might mean the exhaustion of the Company's assets through judgments and executions. The prayer was that the Court take the road into its possession and appoint a receiver to administer the fund, pending the ascertainment of the priorities, liens, and equities of the various creditors;

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103. 208 U. S. 90.

that the receiver should be given power to collect the assets of the Company, operate its railways, and receive the income thereof, to be applied in accordance with the prior rights of the parties as the Court might direct, but otherwise in equal shares to all the creditors; that an injunction should issue against the defendant and all persons claiming to act by, through, or under it, and all other persons, restraining them from interfering with the receiver's possession of the property.

The Metropolitan Railway Company was the owner of a number of street railway lines in New York City which it had leased to the New York City Railway for a period of 999 years, under a lease providing that the rental was partly to consist of the payment by the New York City Railway of the interest charges on the funded debt of the Metropolitan Company. Subsequently to the appointment of a receiver over the New York Company, the Metropolitan Company filed its bill, asking that the receivership be made to extend over the Metropolitan Company, on the ground that the solvency of the petitioning company was so dependent upon the solvency of the lessee company that an ascertainment of the rights of all the parties depended upon the extension of the receivership over the petitioner.

While these bills were pending, certain claimants against the New York Company and others against the Metropolitan Company, who had actions pending for the recovery of their individual claims, filed motions, respectively, to have the bill for a receiver in the New York City Railway Case dismissed, and the bill for extension of the receivership dismissed on the grounds:

- (1) That the plaintiffs in the original bill were simple creditors, and, not having exhausted their legal remedies, were not entitled to relief in equity.

- (2) That the whole litigation was collusive, and did not involve a controversy within the meaning of the Judicial

Code. The motion was denied, and a receiver appointed over the properties of both companies.

The case went up to the Supreme Court on an application by the unsuccessful petitioners for a writ of prohibition to the Judge of Circuit to prevent him from retaining jurisdiction of the cause on the grounds set forth above. The parties to the cause were joined as defendants.

The Court, in denying the writ, said that the objection that plaintiffs were not judgment creditors constituted a defense which the defendant might waive if he wished, citing the case of *Brown v. Lake Superior Iron Company*,<sup>104</sup> and maintained, as to the second objection, that the mere fact that the parties plaintiff and defendant arranged the suit together and were in friendly accord in its prosecution did not constitute collusion, when the plaintiff's claims actually existed.

Barring, for the moment only, the question of inadequacy of the remedy at law arising out of the insolvency of the debtor, and assuming, again only for the moment, such inadequacy, it is difficult to find a single element in the Metropolitan Railway Case and similar receivership cases, which was not a part of classical equity practice. Analyzing the case we find these elements:

(1) A court of equity aiding a judgment creditor, or one who for the purpose of the suit was such, (2) by appointing a receiver, (3) to administer the estate of the debtor for the benefit of all having claims against it, (4) and by protecting the receiver in the possession of the property by an injunction issuing in the receivership suit itself against all persons who might interfere with such possession; (5) the remedy not being affected by the fact that the parties plaintiff and defendant had amicably arranged the suit.

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104. 134 U. S. 530.

Doctrine was applied more recently in *Yaryan Naval Stores Company v. Borchardt Company*, 217 Fed. 758.

(1) "A court of equity aiding a judgment creditor." We have seen that courts of equity had in the Seventeenth and Eighteenth Centuries very zealously created rights in favor of creditors, when the legal remedy against the debtor was inadequate. Of their own accord they developed the creditor's bill against the executor of a deceased debtor, and the creditor's bill against a living debtor to enable the creditor to reach assets not available at law. Under the Statute of 13 Elizabeth the courts of equity developed a more perfect remedy, than the law courts afforded, to give effect to the Statute by enabling the creditor to reach property fraudulently conveyed by the debtor. There was this difference between the bill directed against the executor of a deceased debtor, and that directed against the living debtor, viz., that the former could be brought by a simple creditor, the latter only by a judgment creditor. We have attempted to explain this by saying that the requirement of judgment in the latter case was a requirement of exhaustion of remedies at law, at which point the inadequacy of the legal remedy would be first made to appear; whereas the absence of the requirement in the former case was a recognition by the courts of creditor's inability to get any remedy at all at law. Out of the creditor's bill against a decedent debtor's estate, we have observed, largely following Professor Langdell, that the creditor's administration bill arose—this being like its progenitor available to the simple creditor. Did the creditor's administration bill against insolvent corporations arise out of the creditor's bill against a living debtor to reach equitable assets? The fact that both are available to judgment creditors only gives some ground for saying that they are akin in purpose. This doctrine, in the case of receivership bills, was firmly established by the case of *Hollins v. Brierfield Coal Company*,<sup>105</sup> in which the United States Supreme Court affirmed the decision of the U. S.

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105. 150 U. S. 371.

District Court which refused to appoint a receiver at the suit of a simple creditor, on the ground that the plaintiff had not exhausted his remedies at law. True, the same Court, in *Brown v. Lake Superior Iron Company*, and in *Re Metropolitan Railway Receivership*, held that a simple creditor might have a receiver appointed, if the defendant waived the defense that plaintiff had not exhausted his remedies at law. But it seems to have been the predominant American rule, and certainly the United States rule,<sup>106</sup> as to all kinds of creditors' bills, that the existence of a remedy at law constituted a defense which must have been made in limine; and hence the doctrine of the Brown case does not militate against the kinship of the equitable execution bill and the receivership bill. The Brown Case, it might be said, was commented upon and distinguished by the Court in the Hollins Case. It is probably the broad fact that the equitable execution bill and the receivership are remedies worked out in favor of creditors who have exhausted their remedies at law to enable them through equity to obtain satisfaction on their debts, that caused at least two courts<sup>107</sup> to say that corporate receivership is a form of equitable execution.

(2) "By appointing a receiver." We have noticed that the receiver was an arm of the equity court at the very fountainhead of equity jurisprudence. We have noticed that the receiver was frequently employed in equitable execution suits. Finally we noticed his adaptability to situations, sometimes arising in equitable execution suits, where

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106. *Wylie, Administrator v. Cox*, 15 How. 415;  
*Reynes v. Dumont*, 130 U. S. 354, 395;  
*Underhill v. Van Cortlandt*, 2 Johns Ch. 339, 369;  
*Livingston v. Livingston*, 4 Johns Ch. 287;  
*Sherry v. Smith*, 72 Wis. 339;  
*Becker v. T ickel*, 80 Wis. 484;  
*Pierstoff v. Jorge*, 86 Wis. 128, 136;  
 But see, *Humphrey's v. Atlantic Milling Company*, 98 Mo. 542.
107. *Vila v. Grand Island Electric Light Co.*, 68 Neb. 222;  
*Davis v. Gray*, 16 Wallace, 203, 217.

there were priorities to be taken account of, and conflicting claims to be adjusted. At the time, then, that the administration bill against a decedent debtor's executor was being developed, equity was able to call upon an officer, similar in his functions to the executor, to administer an estate. Aboriginally an indifferent person created to manage property of the litigant parties when it seemed improper to the court that the parties should be suffered to remain in possession, the receiver had become an appropriate party to be the repository of an estate sought by creditors to be subjected to the satisfaction of their debts. And later, as our open eyes will tell us, he did become such repository in that composite creditor's suit against an insolvent corporation, known as the receivership suit.

(3) "To administer the estate of the debtor for the benefit of all having claims against it." Administration for the purpose of securing equal or ratable distribution of a debtor's property among his creditors is the one innovation of the receivership suit, and yet this is older than the Caesars. In the Roman Law the principle involved appeared in the *venditio bonorum*, the first mode of realization by the creditor from his debtor's property. In the English law it appeared in the Bankruptcy Acts. The progress of the equity courts towards the principle of equal distribution was always in the face of pre-existing remedies at law. But where there was a plain inadequacy of remedy at law, as appeared in the case of decedents' estates, we have seen that equity has not failed of that consummation. If an equal inadequacy of remedy at law appear in another realm of legal necessity, let us say in the case of insolvent corporations—and here we are assuming for the moment only that inadequacy of remedy at law—will equity fail to apply the same course of development? The question does not seem difficult to the writer. Equity has done so. That equity developed the receivership out of the equitable execution in the



same manner as it developed the administration bill out of the simple creditor's bill, will be disclosed by an examination of the *modus operandi* of a receivership suit.

(4) "And by protecting the receiver in the possession of the property by an injunction issuing in the receivership suit itself against all persons who might interfere with such possession." This is precisely the mode in which equity made its jurisdiction effective in the administration suits. Under the doctrine that equity would not permit a person accountable to itself for a fund to be directed by a court of law in respect to the fund, it made the receivership suit supreme—it caused all creditors to prove their claims and share equally out of the receivership, and permitted none to gain a priority at law. This injunction it will be noted was issued in the receivership suit itself, and the same manner as the injunction was issued in the administration suit itself—the court apparently assuming that all the parties were before the court, as in the consummation they might be expected to be.

(5) "The remedy not being affected by the fact that the parties plaintiff and defendant had amicably arranged the suit." This smacks very much of the practice in the administration suits of a friendly creditor cooperating with the executor in bringing the suit, or having the executor bring the suit in the creditor's name. The significance of these respective developments is that thereby that suit which secured an equality of distributions was facilitated in preference to those suits which effected individual priorities. Although the Court in the Metropolitan Railway Case speaks of the amicable arrangement as not being collusive, it seems that collusion actually does exist in the effort to prevent other creditors from gaining a priority in a manner which is both legal and equitable; and that it is better to denominate the arrangement as justifiable or "legalized" collusion. Mr.

Byrne in an essay entitled "The Foreclosure of Railroad Mortgages,"<sup>108</sup> in observing that the most frequent mode of foreclosing railroad mortgages had as its first step the bringing of a friendly judgment creditor's bill for a receiver, gave as one of the reasons for this procedure the immediate stoppage of individual suits for judgment and execution. This practice, which Mr. Byrne speaks of as orthodox, well illustrates the double-barrel effect of collusive prosecution and injunction, whereby equity at first brought in the controversy to its own jurisdiction, and then prevented the law courts from interfering with that jurisdiction. The doctrine of collusive prosecution of receivership suits was carried to the vanishing point in the case of the Wabash Railway Receivership of 1884, when the United States Circuit Court for the Eastern District of Missouri appointed a receiver to take over the Railway Company at the Company's own petition, and upon its own allegations of insolvency.<sup>109</sup> The receivership came into the purview of the Supreme Court in the case of the *Quincy Railroad Company v. Humphries*,<sup>110</sup> which involved an appeal from an unsuccessful motion of the Quincy Railroad Company in the receivership case to establish a priority for rentals under its 999 year lease to the Wabash as against the holders of the first general mortgage of the Wabash system. The attack was not directed against the original jurisdiction of the inferior court, but the Supreme Court assumed that jurisdiction had validly attached, without justifying that assumption. In view of the fact that the Wabash Case anteceded the Metropolitan Case, it is not surprising that the jurisdiction in the former case should have been regarded as not only anomalous, but incorrect,<sup>111</sup> and that another rule should have been followed

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108. Stetson, Byrne, Etc., *Some Legal Phases of Corporate Financing, Reorganization, and Regulations*, p. 79.

109. *Wabash Railway Co. v. Central Trust Co.*, 22 Fed. 272.

110. 145 U. S. 82.

111. *State ex rel. Merriam v. Ross*, 122 Mo. 435.

by almost every State court,<sup>112</sup> except that of Pennsylvania,<sup>113</sup> in which the question has arisen. Nevertheless, even though we recognize the origin of the receivership in the equitable cognizance of creditors' rights, it does not seem that there should be a great objection to permitting the corporation itself from voluntarily placing itself in the hands of its creditors, after the Metropolitan Case had established that it could do so by having a dummy creditor bring the suit. Certainly such a result would not be a more radical departure from the creditor's receivership suit, than the legatee's administration suit was from the creditor's administration suit. Certainly it is consonant with the spirit of modern procedure to suffer the style of the case to accord with its actuality. If the corporation can turn itself over to a receiver by "legalized" collusion, why not by direct petition?

## VI.

A single question remains to be answered: What inadequacy of legal remedies prompted the assumption of jurisdiction in equity to administer insolvent estates? Our discussion is not here to be confined to the inadequacy of the remedies which the common law afforded. This inadequacy we have demonstrated in an early portion of this paper, when we described the only legal processes for the satisfaction of creditors as judgment and execution, and limited the inadequacy of the legal system to cases of insolvency where successive executions exhausted the debtor's estate in favor of the more diligent creditors, before subsequently petitioning creditors received any satisfaction

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112. *State ex rel. Merriam v. Ross*, 122 Mo. 435;  
*Kimball v. Goodburn*, 32 Mich. 11;  
*Jones v. Bank of Leadville*, 10 Colo. 464;  
*McIlhenny v. Binz*, 80 Tex. 1, 7;  
*In re Moss Cigar Co., Limited*, 50 La. Ann. 789;  
*Jones v. Schaff Brothers Co.*, 187 Mo. App. 597.
113. *Petition of Kittanning Is. Co.*, 146 Pa. St. 102.

at all. But our discussion must be extended to include a comparison of the bankruptcy acts with the equitable jurisdiction here under examination.

Beginning in the year 1544 and extending uninterruptedly to the present day in England, this legislation afforded an effective means of causing an insolvent debtor's estate to be subjected to the payment pro rata of his creditors' claims, so that there never was a time except when equity was in its rather unpromising infancy, when it could have been said that it had jurisdiction to administer insolvent estates of individual debtors for want of remedy at law. In a like manner, bankruptcy legislation, despite the fact that federal bankruptcy acts have existed during only forty-two years of our national life, has dominated the American jurisprudence of insolvent debtors' estates, both through the constitutional recognition of the field as one to be governed by legislative policy,<sup>114</sup> and through the existence of State insolvency acts.

Assuming that we have the case of an individual debtor, it can be fairly said that a creditor in invoking the aid of equity to secure administration of his debtor's estate would be met with the defense, full, adequate and complete remedy at law. The creditor would be asking nothing which it was not already the function of the bankruptcy acts to afford.

But suppose the debtor were a corporation! It is entirely conceivable, in view of new problems which might arise in the case of corporations, that a court of equity might view the bankruptcy procedure, though applicable to corporations, as incapable of affording so complete and adequate a remedy as equity itself was able to afford. It is entirely possible that we shall find that the equitable remedy of administration was confined to corporations only, because only in the instance of corporations was equity not blocked,

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114. Federal Constitution, Art. I, Sec. 8.

in the exercise of a function which it held ready to exercise, by the defense, full, adequate and complete remedy at law.

That the conception here set forth is a true conception seems to be suggested by two outstanding facts in the contemporaneous history of this subject: (1) That the administration of insolvents' estates in equity is a distinctly American phenomenon; (2) that there exist in England as part of the English Companies' Act very full provisions for the liquidation of insolvent corporations.<sup>115</sup> No special corporate liquidation statutes exist in the United States, and no corporate receivership doctrine exists in England in behalf of the judgment creditors of an insolvent corporation.

It is true that the British courts of chancery have undertaken to administer insolvent corporations. But in all such cases it will be made to appear that the administration was undertaken in behalf of proprietary interests, and not in the perfection of creditors' remedies.

Thus, in *Ames v. The Trustees of Birkenhead Docks*,<sup>116</sup> a typical case, suit was brought by a mortgagee of the tolls of an insolvent dock company to enjoin judgment creditors from attaching the tolls, and to have a receiver appointed to collect the tolls and to apply them, after the payment of operating expenses, to the satisfaction of plaintiff's mortgage debt. The Court held that the injunction had properly issued, and the receiver had properly been appointed. To the objection of a judgment creditor that the receiver of a mortgagee had no franchise, or would have no franchise, to operate the docks, the Court made the following statement,

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115. A very full discussion of the Companies' Act of 1908 is found in Lord Halsbury's Laws of England, Vol. 5. Earlier Companies' acts are 7-8 Vict. C. 110 (1844), 19-20 Vict. C. 47 (1856), and 25-26 Vict. C. 89 (1862).

116. 20 Beav. 332. See also, *Potts v. Warwick and Birmingham Canal Co.*, Kay 142; *De Winton v. Mayor of Brecon*, 26 Beav. 533; *Hopkins v. Worcester and Birmingham Canal Proprietors*, L. R. 6 Eq. 437.

definitive of the nature of the right which its receiver was to be appointed to protect:

"If no such power of taking possession existed the mortgage would be a worthless security, and the mortgagee would be at the mercy of the mortgagor, who, in that case, might say to him, if you enforce your mortgage, you destroy the property mortgage."

It is a considerable step, however, from the enforcement of a property right to the enforcement of a creditor's claim. This step the English Court of Chancery refused to take. In *Gardiner v. Railway Company*,<sup>117</sup> it declined to administer by its receiver upon the assets of an insolvent corporation in the interest of an unsecured creditor. It is doubtful if the court could have done otherwise than to have declined the jurisdiction in the face of a corporate liquidation statute which purported to deal comprehensively with the disposition of the assets of insolvent corporations.

Recurring now to the situation confronting an American court of equity, when asked to administer by its receiver an insolvent corporation, it becomes clear that the court is not hampered in its jurisdiction by any statutory development other than the bankruptcy legislation. This legislation originated before corporation problems had assumed any significance. Although it had subsequently been made applicable to corporations, it can fairly be said that the legislation was originally conceived without reference to them. Whether such a remedy was a full, complete and adequate remedy at law, so as to be an efficient bar to equity jurisdiction, is the crux of this inquiry.

In approaching the question of adequacy of remedy we are not applying a legal yard-stick, but we are expressing a ratio of legal remedy to factual circumstances. In the denominator of that ratio we must consider the economic circumstances of the corporation, which, if potent enough,

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117. L. R. 2 Ch. App. 202.

may conceivably cause the same legal remedy, bankruptcy, adequate enough as to individuals, now to express a fractional ratio of adequacy. We believe this to be not only conceivable but true. As a result of industrial revolution, by and large, individuals have limited numbers of assets and very simple balance sheets. By and large, corporations have a maze of assets and liabilities, controllable often only by armies of accountants. The provisions of the Bankruptcy Acts for the institution of suits by a specified number of creditors representing specified amounts,<sup>118</sup> the individual allowances of claims,<sup>119</sup> the meetings of creditors,<sup>120</sup> their appointment of a trustee,<sup>121</sup> all savor of an economic plane to which corporations do not as a group belong. But this goes to the unsuitableness of the legislative remedy, not to its inadequacy. And there lies not our chief grievance. The economic integration of industry, which has gone on hand in hand with the development of the corporation as its form of organization, has been characterized by two new phenomena having bearing on our subject. In the first place, by a corresponding integration of property rights in the assets of the corporation, represented by various classes of securities. The Bankruptcy Act has not provided a means of adjusting the priorities of secured creditors in the same suit with the general creditors. It is therefore inadequate. In the second place, the economic integration of industry is characterized by an increased importance of aggregate values. By that we mean that the value of the assets of a corporation tend to approximate a capitalization of earning power, rather than to equal the sum of the values of the individual properties. This is so because the individual properties function as a part of the whole integrated system.

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118. Bankruptcy Act of 1898, Sec. 59b.

119. *Ibid.*, Sec. 55b.

120. *Ibid.*, Sec. 55a, e.

121. *Ibid.*, Sec. 44.

The Bankruptcy Act in providing for the sale of the properties rather than the continuance of their use in the integrated whole is destroying values which may be the only values remaining to the simple creditors after consideration of security holders. This condition is well illustrated by the Wabash Railway Receivership. The Wabash System was composed of a great many rail properties owned subject to divisional mortgages, or leased subject to stipulations for the payment of interest on the mortgages on the property. A default of interest would have been followed by separate foreclosures, and the eventual disintegration of the system, rendering the equities available to simple creditors unavailable. The inability to accomplish consistence under the Bankruptcy Act made its remedies clearly inadequate. Finally, in the case of public service corporations, public interest demands continued operation, and forbids disintegration.

Viewing the receivership doctrine as the product of an evolution of creditors' remedies in equity—an evolution having as its impulse the inadequacy of remedy at law, which knew only individual judgments and executions, and which failed of equal justice when the judgments and executions exhausted the debtor's estate—we are driven to the conclusion that the justification for its confinement to corporations does not lie in the legal differences between a natural person and a corporation, and the character of the assets of the latter as trust funds, but in the economic differences as affecting the adequacy of the remedy at law, provided by the bankruptcy acts.

To say that equity would have developed a receivership system applicable to individuals and corporations during the Seventeenth and Eighteenth Centuries in England, if no Bankruptcy Acts had intervened, is mere speculation. To say that it would have developed such in the case of corporations during the Nineteenth Century, when corporations were becoming important, if no Companies Acts had inter-



vened, is likewise speculation. All that may be said is, equity had the equipment, and had used similar equipment under similar circumstances in the case of decedents' estates. And although the American doctrine is by no means uniform,<sup>122</sup> the existence of jurisdiction in the United States courts needs no testimonial, but the testimonial of fact.

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122. In many states, the jurisdiction to administer insolvent corporations was exercised in only a limited form. In others, the creation of the remedy was the work of the legislatures. Decisions and statutes governing the doctrine in the several states are gathered in 4 Pomeroy, *Equity Jurisdiction*, IV Ed., Sec. 127, note 310.